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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 750.

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI,
PETITIONER,

VS.

STATE OF MISSOURI, AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI.

BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

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PETITION FOR CERTIORARI.

To the Supreme Court of the United States:

Your Petitioner, Glenn C. Weatherby, respectfully alleges:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Glenn C. Weatherby, a citizen, lawyer and taxpayer of Missouri, resident of Platte County, instituted suit in the Circuit Court of Cole County in said state, against a class comprised of several hundred thousand holders of fire insurance contracts, or policies, to recover a reasonable attorney's fee to be paid from a fund belonging to said policyholders, and recovered for them through his efforts, then in the possession of the Superintendent of Insurance of the State of Missouri, for their use.

Such petition named certain policyholders as defendants, who were representative of the whole class, and joined the Superintendent of Insurance as a co-defendant, because he was in possession of said fund, and said petition was based upon the claims—(a) that said Superintendent as the representative of said policyholders, as a class, under authority given him by Section 5678, Revised Statutes of Missouri, 1929, employed him, and associate counsel, as attorneys at law to represent said policyholders, and defend them in an action brought by the fire insurance companies, to obtain an increase in fire insurance rates in Missouri; that he agreed, as such representative, that the said Weatherby should be paid from any fund saved and preserved in said action for said policyholders, the amount of his compensation to be fixed by the court; that said policyholders paid said increase of rates, pending the trial of said cause, and said insurance companies thereupon impounded such excess charges with said Superintendent of Insurance, and when said attorneys defeated the right of said insurance companies to an increase of rates, there was captured, saved, and preserved for said policyholders, as a class, solely through his efforts and his lawyer associates, the impounded fund, in excess of the sum of $1,650,000.

Immediately following the institution of his suit in the Circuit Court of Cole County, the defendant, Super-

intendent of Insurance (the defendant policyholders not joining), applied to the Supreme Court of Missouri for a writ of prohibition to prevent the Cole County Circuit Court from assuming or exercising any jurisdiction of his suit. Preliminary rule was issued, and thereafter on final hearing such rule was made absolute (R. 42). The writ of prohibition was addressed to Judge Sam C. Blair, Judge of the Circuit Court of Cole County, and he was thereby made a party, and appears on the record in this court as the petitioner, although the said Weatherby is the petitioner in fact, and will hereafter be referred to as such.

The facts below were as follows: In June, 1930, the Superintendent of the Insurance Department of the State of Missouri, acting in his official capacity in regard to the regulation of fire insurance rates, and also acting as the representative of all fire insurance policyholders in the state (numbering nearly 500,000) refused to approve an application for a sixteen and two-thirds per cent increase in rates, made by all fire insurance companies doing business in Missouri; that thereupon seventy-four of said companies filed a joint suit in the Circuit Court of Cole County, Missouri, for a statutory review as to the reasonableness of such application for increase; thereupon said Superintendent was called upon to defend said action, both for the state, and policyholders, and under Section 5678, Revised Statutes of Missouri, 1929 (see appendix), employed petitioner and other attorneys to resist said application for said increase, and that during the litigation that followed, all of said policyholders paid such increased rate to said insurance companies, and the same was by them impounded with the Superintendent of Insurance to await the outcome of said litigation; that if said application for said increase was approved by a court of last resort, then said insurance companies were to receive said impounded premiums, but if said application was denied, then said impounded funds were to be returned to said policyholders as provided by Section 5874,

Revised Statutes of Missouri, 1929 (see appendix); that said Superintendent of Insurance for and on behalf of said policyholders, who were the real parties interested, entered into a contract of employment with petitioner and other lawyers (Section 5678, Revised Statutes of Missouri, 1929) employing them to resist said application for said increase, and said matter was litigated for many years, when the Supreme Court of Missouri sustained said Superintendent, and denied such increase (*American Constitution Fire Assurance Co.* v. *O'Malley,* 342 Mo. 139, 113 S. W. 2d 795).

The said contract of employment (approved by the governor) provided, among other things, that if at the end of the litigation, there was an impounded fund saved for the policyholders who had impounded same, then, and in that event, petitioner and his associate lawyers should be allowed to present a claim against said fund for attorneys' fees, to be fixed by the court.

The adverse opinion of the Supreme Court of Missouri, in prohibition (not yet published officially but reported in 144 S. W. 2d 106 and set forth at pages 42 to 48 of the Record) held that petitioner and his associate lawyers were legally employed, as provided by said statute, but that said Superintendent, although employing petitioner and his associates to represent said policyholders, did not have the authority to bind the impounded funds for their compensation, because the Missouri Insurance Code (Sections 5679, 5686 and 5688, Revised Statutes of Missouri, 1929) (See appendix) provided a method to defray the expense of enforcing the insurance laws (R. 46-47), and that petitioner and his associates could only be paid as an ordinary expense of the Insurance Department, from funds provided that department, by the state legislature.

Such opinion is in direct conflict with a former opinion by the Supreme Court of Missouri, involving another phase of the same rate litigation, and involving the same lawyers, *Aetna Insurance Co. et. al.* v. *O'Malley, Supt.* (343 Mo. 1232, 124 S. W. 2d 1164). There, in holding,

that the Insurance Code did not provide any method of payment, the court said: "It is to be noted that Section 5678, *supra*, does not specify how an attorney who has been employed by the Superintendent is to be paid, *nor is there any provision in the Insurance Code as to the method.*" While in the instant case (R. 46) the same court holds that there are two methods provided by the Insurance Code authorizing the payment of attorneys employed, as was Weatherby, and then states: "The plaintiff Weatherby is not seeking payment by either method provided by the statutes." Also, in a case involving these same parties, *State ex rel. Carwood Realty Co.* v. *Dinwiddie, J.* (343 Mo. 592, 122 S. W. 2d 912), this same court in connection with the same fund suggests that counsel must be paid in the same way as any other expense of the Insurance Department. Such opinions are in hopeless conflict as to whether the Insurance Code does or does not provide a method of payment.

The case, brought before this court for review, on petitioner's claim that the opinion of the Supreme Court of Missouri (R. 42-48; 144 S. W. 2d 106) denies to him due process of law and equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution, for these reasons: The opinion holds that petitioner was employed by the Superintendent of Insurance of the State of Missouri, to represent the policyholders in said action, to prevent an increase in insurance rates. But, said opinion denies to petitioner the right to compensation from said fund recovered for said policyholders, solely on the ground that petitioner can only be paid under the Insurance Code, as any other expense of the Insurance Department is paid, evidently referring to Section 5679, *supra*, of said Code which provides, among other things, that "all expenses of the Insurance Department shall be paid monthly out of the amount appropriated by law from fees collected by the Insurance Department" (This being the only section in the Insurance Code, as will appear from a reading of said

sections set out in the appendix, which makes any provision for the payment of general expenses by said Insurance Department). Thus superseding and destroying the common law right of petitioner to be paid from said fund saved and preserved through his efforts (belonging to private individuals) thereby relegating him to the Legislature of Missouri, for his payment.

Petitioner denies that said sections of the Missouri Statute referred to (see appendix) interfere in any way with his payment from the fund in question, but that said sections deal solely with the general and ordinary current expenses of said department, and that as said services were rendered to said policyholders as a class, they should pay for such services. The construction thus placed upon such sections of the statute, *supra*, relegates petitioner to the legislature for any relief, and denies him a judicial forum where he can have a hearing on the value of his services; and denies him due process of law and the equal protection of the law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. While petitioner concedes the right of the Missouri Supreme Court to construe its own statutes, yet when it construes them in a way to deprive petitioner of his rights under such Amendment to the Constitution, such statutes become unconstitutional as an infringement upon his rights claimed. He is entitled under said amendment to a judicial forum in which any dispute as to the amount or value of his compensation may be judicially determined.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Such holding by the Missouri Supreme Court is in conflict with previous decisions of the court, *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 537; *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, 24 S. Ct. 319; *Truax et al.* v. *Corrigan et al.*, 257 U. S. 312, 42 S. Ct. 124; and *Edward* v. *Kearzey*, 96 U. S. 595. These decisions guarantee

to petitioner a judicial forum where his contract may be enforced. And because of such ruling by the Supreme Court of Missouri, this petitioner has been denied the equal protection of the laws and due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. These questions were raised and kept alive throughout the litigation: (a) In the petition which was filed in the circuit court (R. 10); (b) In answer to the petition for prohibition in the Supreme Court of Missouri (R. 25, 26, 27, 28); (c) In the brief which petitioner filed in the Supreme Court of Missouri; (d) In the motion for rehearing which petitioner filed in the Supreme Court of Missouri (R. 53). The Supreme Court of Missouri in its opinion specifically passed upon the federal rights claimed (R. 47, 48) and denied same.

The employing statute (Section 5678) authorizes employment, but makes no provision for payment, and the general expense statute referred to in the Missouri Supreme Court opinion (Section 5679) and other statutes shown in the appendix, were not construed by this court until several years after the contract of employment was entered into (*Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 1232, 124 S. W. 2d 1164 (1938); *State ex rel. Carwood* v. *Dinwiddie*, 343 Mo. 592, 122 S. W. 2d 912 (1938), and this opinion (144 S. W. 2d 106) (R. 42-48)).

The construction of said statutes, placed thereon by the Missouri Supreme Court (R. 46-48) for the first time, had the effect of denying petitioner due process of law, the equal protection of the law, and the right to a judicial forum.

The Supreme Court of Missouri has decided said federal questions in a way not in accord with the applicable decisions of this court upon analogous questions, and there is a conflict of decision between the highest court of Missouri, and other state and federal courts, as to the rights of an attorney to be paid from a fund preserved and saved for members of a class, under a con-

tract with the representative of such class, for services rendered said class, or even where there is no contract of employment, but the services rendered inured to the benefit of the class, and where there is no statute expressly prohibiting such employment. See this opinion (R. 42-48); *Sprague* v. *Ticonic National Bank et al.*, 307 U. S. 777, 779; *Lindheimer et al.* v. *Telephone Co.*, 292 U. S. 151, and memorandum opinion of the three-judge court in that case allowing attorneys' fees from the fund preserved (see appendix); *Haynie, Parks & Westfall* v. *Camden Gas Corp. et al.*, 186 Ark. 842, 56 S. W. 2d 419; *Board of Education* v. *Lonoke County*, 181 Ark. 1046; *Council of Village of Bedford* v. *State ex rel. Thompson, Hine & Flory, a partnership*, 123 Ohio State 413.

The foregoing federal questions are questions of substance, and of great importance, not only in the State of Missouri, but in numerous other states, which have statutes authorizing the regulation of fire insurance rates. Said questions have not heretofore been, but should be, authoritatively and finally settled and determined by this court.

A decision in this case will go far toward establishing a future standard of conduct for rate making bodies in the employment of special counsel in complicated rate cases. It is a matter of common knowledge, that utilities, in rate making matters, employ lawyers highly skilled in that field, and a state may be handicapped through the use of its duly elected or appointed officials, because such state officers are usually elected or appointed for two or four years. Rate litigation usually lasts many years as the records in this court will show, and cover many changes in administration. Most of the rate cases in this court, it will be observed, were handled by private counsel, skilled in that line (See *Lindheimer case, supra*). If said Missouri statutes, as construed by the highest court of the state in this opinion (R. 42-48), denies the right of counsel to be employed by a rate making body,

and to be paid from a fund impounded during the litigation, such statutes, and each of them, deny petitioner due process of law, and the equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States and impairs the obligation of a contract in violation of Section 10, Article I of the Constitution of the United States because all other attorneys throughout America, and in other states, have such right of contract.

Wherefore, your petitioner prays that this court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Statute 973, issue a writ of certiorari to review the judgment of the Supreme Court of Missouri, denying petitioner the right to be paid from a fund belonging to a class, and secured through his efforts.

All of which is herewith respectfully submitted this 7 day of February, 1941.

.....,
Petitioner.
By JOHN T. BARKER,
Attorney.